

- (1) Did claimant submit timely written claim as required by K.S.A. 44-520a?
- (2) Did claimant provide timely notice of accident as required by K.S.A. 44-520?

- (3) What is the nature and extent of claimant's injury or disability?

Respondent raised the following issues in its brief to the Board:

- (1) Did claimant sustain personal injury by accident on the dates alleged?
- (2) Did claimant's accidental injury or injuries arise out of and in the course of his employment?
- (3) Is claimant entitled to future and unauthorized medical benefits?
- (4) Should claimant's preexisting functional impairment be considered in calculating any work disability award?

However, respondent, at oral argument, admitted that respondent was not contesting whether claimant suffered accidental injury arising out of and in the course of his employment. Therefore, these issues, found by the Administrative Law Judge in the Award in claimant's favor, are affirmed.

In addition, claimant raised the following issue in his memorandum brief:

What was claimant's date of accident?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award by the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury while performing concrete finishing work for respondent, a company owned by his father. Claimant had been performing this concrete finishing work for many years. In December 1996, he began experiencing more than normal low back pain. Claimant had been treated by Jim H. Borgeson, D.C., a chiropractor, prior to December 1996 for low back problems but, after December 1996, his condition progressively worsened to the point where, by October 23, 1997, claimant could no longer perform his regular duties. Claimant was transferred to light duty work, doing primarily paperwork. However, in November 1997, his employer could no longer accommodate his light duty restrictions, and claimant's employment with respondent was terminated.

The Administrative Law Judge found claimant suffered accidental injury through October 23, 1997, the last day claimant was paid for his regular duties. The Administrative Law Judge went on to cite Treaster V. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325

(1999). The Appeals Board concurs, finding claimant's date of accident to be a series of accidents through October 23, 1997. As claimant had provided notice to respondent prior to that time, and had obtained medical treatment before October 23, 1997, the Appeals Board finds that the notice provisions of K.S.A. 44-520 have been satisfied. In addition, claimant's Application for Hearing (E-1) was filed with the Division of Workers Compensation on November 10, 1997. This satisfies the written claim time limit set forth in K.S.A. 44-520a.

Respondent also argues that claimant's substantial preexisting impairment should allow respondent a reduction against claimant's work disability pursuant to K.S.A. 1997 Supp. 44-501. However, respondent provides no medical evidence of what this preexisting impairment should be. Claimant received chiropractic treatment with Dr. Borgeson before December 1996. However, Dr. Borgeson did not testify as to what, if any, preexisting functional impairment claimant may have suffered.

Daniel D. Zimmerman, M.D., examined claimant and found claimant did suffer preexisting symptoms, but he also failed to assess claimant a preexisting functional impairment. When asked whether claimant would have been restricted prior to December 1996, he testified he had no reason to know the answer to that question as he did not have records from claimant's earlier treatment that would have allowed him to form such an opinion. The 9 percent whole body functional impairment Dr. Zimmerman gave claimant was attributable only to the December 1996 through October 1997 aggravations. He did not attribute any portion of his rating to anything preexisting December 1996.

At respondent's request, claimant was also examined by Jeffery J. MacMillan, M.D. Dr. MacMillan found claimant's examination to be normal and provided a zero percent functional impairment to claimant's low back. This opinion was rendered despite the positive findings on the 1997 MRI, showing that claimant had disc desiccation at L3-4. Dr. MacMillan diagnosed mild degenerative disc disease at L3-L4 and low back pain, but did not believe, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, this would result in any permanent functional impairment. In addition, Dr. MacMillan testified that he doubted a degenerative back condition could be aggravated by work activities. The Appeals Board, as did the Administrative Law Judge, finds Dr. MacMillan's opinion lacks credibility.

Claimant was examined as part of a court-ordered independent medical examination by Edward J. Prostic, M.D., an orthopedic surgeon. Dr. Prostic found claimant's condition to have been aggravated by repetitive work activities, acknowledging claimant's condition after December 1996 was worse. Dr. Prostic, however, provided no opinion regarding claimant's preexisting functional impairment or how it would have affected his ability to perform his work.

After reviewing the record, the Appeals Board finds there is no evidence in the record to determine claimant's preexisting functional impairment, and respondent's request

for a reduction from the award is, therefore, denied. The Appeals Board finds claimant has suffered a 9 percent whole body disability based upon the opinion of Dr. Zimmerman.

In considering the nature and extent of claimant's disability, K.S.A. 1997 Supp. 44-510e requires that the fact-finder consider both the lost ability to perform work tasks that claimant performed in substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is earning after the injury.

The only task loss opinions contained in the record are those of Dr. Zimmerman, who found claimant to have an 83 percent loss of task performing abilities, and Dr. MacMillan, who found that claimant had suffered no injury as a result of the complaints generated between December 1996 and November 1997. The Appeals Board has already discounted the opinion of Dr. MacMillan and will, therefore, rely upon the opinion of Dr. Zimmerman, finding claimant has a task loss of 83 percent.

In considering what, if any, wage loss claimant has suffered, the Appeals Board must take into consideration the policies found in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Kansas Court of Appeals held that, if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of facts is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. Here, it is noted that claimant, after being terminated by respondent, intermittently participated in the operation of a small, family-owned business. Beyond that, claimant's efforts to find post-injury employment were lacking. The Appeals Board finds claimant did not put forth a good faith effort.

The Administrative Law Judge found claimant capable of earning at least a minimum wage of \$206 per week, and that finding is supported by the evidence in the record. The Appeals Board, therefore, imputes a post-injury wage of \$206 per week which, when compared to claimant's average weekly wage of \$475 per week, as found in the Award, results in a wage loss of 57 percent.

K.S.A. 1997 Supp. 44-510e obligates the finder of facts to average both the wage loss and the task loss in rendering an opinion regarding work disability. The 57 percent loss of wage earning ability, when compared to claimant's task loss of 83 percent, results in a permanent partial disability of 70 percent. The Appeals Board, therefore, affirms the Award of the Administrative Law Judge.

Claimant is further awarded unauthorized medical care up to the applicable statutory limit upon presentation of an itemized statement verifying same, and future medical care upon application to the Director.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated October 1, 1999, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2000.

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BOARD MEMBER

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**DISSENT**

I disagree with the majority's award because it includes the amount of claimant's preexisting functional impairment. K.S.A. 1997 Supp. 44-501(c) provides, inter alia, that:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered from a preexisting degenerative process and had prior symptoms and treatments for his low back condition. That claimant had some preexisting functional impairment is clear. What is not clear is how much of claimant's current functional impairment is new, that is to say how much is a result of his employment with respondent and how much preexisted. I agree with the majority that the record fails to establish the percentage of preexisting impairment to the back, but claimant bears the burden of proving the nature and extent of his disability. This burden includes proving how much of his present impairment is from the work-related accident.

At page 45 of his deposition, Dr. Zimmerman testified that he was not attributing any portion of his rating to claimant's preexisting condition. The majority takes this statement

out of context to conclude that all of Dr. Zimmerman's rating was for this accident. What Dr. Zimmerman actually said was that he lacked sufficient information to apportion any of his rating to the preexisting condition. Dr. Zimmerman stated, at page 44 of his deposition, that "[t]he restrictions I offered are based on his assessment at the time I saw him." The same is true of the rating. It is based upon his assessment of claimant's condition at the time he examined claimant. Dr. Zimmerman, thereby, includes claimant's preexisting condition in his rating.

K.S.A. 1997 Supp. 44-501(a) clearly places the burden of proof on the claimant to prove all of the various conditions upon which his entitlement to compensation depends. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

Claimant has also failed to prove the wage loss prong of his work disability. K.S.A. 1997 Supp. 44-510e measures wage loss as "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." As stated by the majority, our appellate courts have read into this language a good faith requirement. In this case, there was a lack of good faith. Claimant's wage loss, therefore, is measured by his post-accident ability to earn wages. "If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." Copeland at 320.

The record in this case fails to establish claimant's post-accident, wage earning ability. The majority uses the federal minimum wage because this is considered the minimum claimant can earn, but it is not the maximum he can earn. In this case, minimum wage is not a reasonable measure of claimant's ability. Claimant bears the burden of proving the extent of his permanent partial disability, including his post-accident capacity to earn wages if his actual wage loss is not used. Because there is no credible evidence of claimant's wage loss, the percentage proven is zero.

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BOARD MEMBER

c: Roger D. Fincher, Topeka, KS  
Michael H. Stang, Overland Park, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director